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MICHAEL RODAK, JR., CLERK

**In the Supreme Court
of the United States**

OCTOBER TERM, 1977

No. 77-1114

THE STATE OF NORTH DAKOTA

Plaintiff-Respondent,

VS.

PHILIP J. TERNES,

Defendant-Petitioner

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

The Petitioner, Philip J. Ternes, was charged with the offense of murder and convicted of the lesser included offense of manslaughter.

Under North Dakota law murder is a Class A Felony which ordinarily carries a maximum penalty of 20 years imprisonment, a fine of \$10,000 or both; manslaughter is a Class B Felony which ordinarily carries a maximum penalty of 10 years imprisonment, a fine of \$10,000 or both.

However, North Dakota also has a "Dangerous Special Offender" statute, section 12.1-32-09 NDCC. That statute is hereinafter referred to as the "Special Offender Act" and it allows a court to sentence a convicted offender to an extended sentence if the defendant is found to be a dangerous special offender within the meaning of the statute. The Special Offender Act is set out fully at A17 of Petitioner's Appendix.

Briefly, the first subsection of the act describes the categories of dangerous special offenders. The second subsection prescribes the maximum allowable extended sentences which may be imposed if the convicted offender is found to be a dangerous special offender within the meaning of the statute. The third subsection of the act provides a procedure for the prosecutor to notify the defendant that he is seeking extended sentencing under the Special Offender Act. The fourth subsection establishes a procedure which requires the prosecution to prove, by a preponderance of the evidence, that the convicted offender is a dangerous special offender within the meaning of the statute at a hearing held upon at least five days notice to the defendant.

Prior to the trial of the action, in accordance with the provisions of the act, the prosecution served a "Notice that Defendant is a Dangerous Special Offender" on Petitioner. The relevant provisions of the notice read:

"Comes now Richard L. Schnell, the Attorney charged with the prosecution of the above-named defendant, Philip J. Ternes, and pursuant to section 12.1-32-09(3) of the NDCC hereby gives notice that he has reason to believe that the defendant, Philip J. Ternes, is a dangerous special offender who upon conviction of the offense of murder is subject to imposition of sentence under the provisions of section 12.1-32-09(2) (a) and further states that the reason he believes Philip J. Ternes is a dangerous special offender is that Philip J. Ternes used a firearm in the commission of the offense of murder as charged in the information in the above-captioned action.

Thus, prior to the trial of the action, the Petitioner was informed that upon conviction the prosecution would attempt, at a later hearing, to prove that the Petitioner fit into one of the categories of dangerous special offenders described by the Special Offender Act, namely section 12.1-32-09(1) (e). That section provides that a convicted offender can be sentenced to an extended term of imprisonment under the provisions of the Special Offender Act if the court finds:

"The offender is especially dangerous because he used a firearm . . . in the commission of the offense . . ."

Although Petitioner was served with the notice that the prosecution would be seeking extended sentencing upon conviction, and the notice was filed with the Clerk of the trial court, the presiding judge was not informed of the filing of the notice and the notice was left in a sealed envelope in the office of the clerk. The reason the presiding judge was not informed of the filing of the notice was that a portion of the Special Offender Act, section 12.1-32-09(3) NDCC, which has since been amended, read:

"In no case shall the fact that the prosecuting attorney is seeking sentencing of the defendant as a dangerous special offender be disclosed to the jury, or be disclosed,

before any plea of guilty or verdict or finding of guilt, to the presiding judge without the consent of the parties."

There is no dispute that at Petitioner's arraignment he was informed that the maximum penalty for murder was 20 years imprisonment, a fine of \$10,000 or both.

The matter proceeded to jury trial and the jury returned a verdict of guilty of the lesser included offense of manslaughter.

Immediately upon the return of the verdict the prosecution informed the presiding judge that the statutory notice had been filed and the prosecution would be seeking extended sentencing under the provisions of the Special Offender Act. Petitioner immediately objected to the application of the act on grounds that the act violated Petitioner's rights under Amendments VI and XIV of the United States Constitution.

During the trial of the action Petitioner took the stand and admitted he had used a pistol in the commission of the offense. In addition, the evidence overwhelmingly indicated he had shot the victim with a pistol. Based on the trial testimony Petitioner waived the required hearing and agreed the prosecution could prove by a preponderance of the evidence that he had used a firearm in the commission of the offense.

It should be noted that Petitioner never requested a bill of particulars or made any other motion seeking to compel the prosecution to allege with particularity why the prosecution had reason to believe that he was "especially dangerous" other than the allegation that he had used a firearm in the commission of the offense.

The trial court called for briefs on the constitutionality of the Special Offender Act and after briefs were submitted heard oral argument. The court then determined that the act was constitutional and had been constitutionally applied to Petitioner and sentenced Petitioner to an extended sentence under the provisions of the act.

Petitioner perfected timely appeal to the North Dakota Supreme Court and raised the issue of the constitutionality of the act and its application to Petitioner. The North Dakota Supreme Court held the act was constitutional and had been constitutionally applied to Petitioner in *State v. Ternes*, 259 NW2d 296 (N.D. 1977), which is set out fully at A1-A14 of Petitioner's Appendix. Petitioner's petition for rehearing before the North Dakota Supreme Court was denied on November 10, 1977.

Petitioner has applied for a Writ of Certiorari to this Court alleging the Special Offender Act violated Amendments VI and XIV of the United States Constitution and that it was unconstitutionally applied to him.

Although Petitioner in the "Questions Presented" section of his Petition alleges that section 12.1-32-09(2) (a) (emphasis added) is unconstitutional, it evident from reading the total petition that he is referring to portions of section 12.1-32-09(3) NDCC.

Specifically, it appears that Petitioner is alleging:

(1) The portion of section 12.1-32-09(3) NDCC which required the prosecution to withhold the fact that it would be seeking extended sentencing under the Special Offender Act from the trial court until after a finding of guilt violated Amendments VI and XIV of the United States Constitution in that the defendant, before entering a not guilty plea to the offense charged was not correctly informed of the maximum penalty which could be imposed upon conviction;

(2) The Special Offender Act was unconstitutionally applied to Petitioner because he was not informed with sufficient particularity of the nature of the acts which the prosecution would attempt to prove at the special offender hearing; and

(3) The prosecution did not inform Petitioner that it would be seeking extended sentencing under the Special Offender Act if Petitioner was convicted of a lesser included offense.

ARGUMENT

It appears that the only substantial federal question raised by Petitioner is whether Amendments VI and XIV of the United States Constitution require the presiding judge at a criminal arraignment, upon accepting a not guilty plea, to inform a defendant that an additional penalty may be imposed upon conviction if the defendant is found to be a dangerous special offender, where statutory procedures mandate that the defendant be served with notice that extended sentencing will be sought, and after conviction the defendant has a right to a hearing on the issue of extended sentencing.

While this specific issue has not been directly addressed by this Court, it appears that the decision below is probably in accord with the applicable decisions of this Court, specifically *In re Oliver*, 333 U.S. 257.

There, at 333 U.S. 273, this Court set forth the minimum basic requirements mandated by Amendment VI.

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

It appears likely that the procedures followed in this action satisfied, in fact greatly exceeded, the minimum standards set forth above.

Petitioner has also raised the issue of lack of specificity in the "Notice that Defendant is a Dangerous Special Offender". First, it appears unlikely that defendant has preserved his right to appeal on this issue as he made no motion to compel the prosecution to allege with further particularity why the prosecution thought the defendant was a dangerous special offender. Second, this issue has been determined on independent state

grounds, the North Dakota Supreme Court having specifically found regarding special offenders armed with a firearm:

"We interpret the words of the statute as establishing four categories of special offender who may be shown to be dangerous, and one category of special offenders who are, per se, dangerous. We cannot say that the Legislature has not the power to do that. *State v. Ternes*, 259 NW2d at 299, Petitioner's Appendix at A6.

We interpret the language of § 12.1-32-09(3), NDCC as not requiring that the notice involving § 12-1-32-09(1) (e) set out with particularity the reasons why the prosecutor believes the defendant to be a dangerous special offender when the Legislature has conclusively stated that a felon who uses a firearm is a dangerous special offender. *State v. Ternes*, 259 NW2d at 300-301, Petitioner's Appendix at A9.

Defendant's last issue, that the special offender proceedings could only be invoked if the petitioner was found guilty of the offense of murder, not the lesser included offense of manslaughter has also been dealt with on independent state grounds, the North Dakota Supreme Court having found:

"In the case before this Court, the particularity requirement was met in the statute itself. By the plain words of the statute, it is unnecessary to state precisely the charge which has been brought against the defendant. The notice that Ternes is a dangerous special offender, which was dated November 17, 1976, and was never amended, complies with the requirements of § 12.1-32-09 (3) when § 12.1-32-09(1) (e) is invoked. *State v. Ternes*, 259 NW2d at 300-301, Petitioner's Appendix at A9.

CONCLUSION

For the reasons given in the Argument that it appears Petitioner's allegations of error have either been dealt with on adequate state grounds or have been decided below in conformity with applicable decisions of this Court it is respectfully requested that Petitioner's Petition for a Writ of Certiorari be, in all respects, denied.

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